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No. 07-605

IN THE
SUPREME COURT OF THE UNITED STATES

MARK HURN
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

The Government argues in its Opposition (Opp.) that "the clear import of the Court's decision" in *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) "is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution." Opp. 2. The Government states that "the acquitted conduct issue does not warrant this Court's review," citing its arguments in earlier briefs in *Mercado* v. *United States*, petition for cert. pending, No. 07-5810 (filed Nov. 30, 2007) and *Ashworth* v. *United States*, petition for cert. pending, No. 07-8076 (filed Feb. 8, 2008). The Government states further that "every court of appeals has held that a district court may consider acquitted conduct at sentencing."

The Government also argues that Petitioner's contention that his sentence was unreasonable under 18 U.S.C. § 3553(a) is not properly before this Court, but that "courts of appeals have correctly and repeatedly rejected similar contentions." Opp. 3-4.

None of these arguments is persuasive, nor directly addresses the issues raised by Hurn's Petition, and this Court should grant review.

First, this Court's recent Sixth Amendment decisions reveal that heavy reliance on acquitted conduct to justify an extreme sentence enhancement must be ruled unconstitutional in light of the inviolate right to a jury trial under the Sixth

Amendment. As this Court has held, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." *Cunningham* v. *California*, 127 S. Ct. 856, 863-64 (2007); *United States* v. *Booker*, 543 U.S. 220, 227-28 (2005). In the case below, Hurn's sentence of 210 months was based "almost entirely" upon acquitted conduct, as the jury considered and rejected the prosecution's accusation at trial that Hurn should be held criminally responsible for distribution of crack cocaine.

Second, this matter is properly before the Court. In the courts below, Hurn argued that his sentence based "almost entirely" on acquitted conduct was unreasonable under 18 U.S.C. § 3553(a). Pet. C.A. Br. 12-15. Hurn presented and the lower courts considered arguments on both the unconstitutionality of his sentence based on acquitted conduct and its unreasonableness under Section 3553(a). *Id.* It is consequently appropriate for this Court to grant review.

For these reasons, this case warrants immediate review by the Court, because it presents the critically important and recurring issue of whether federal courts may rely upon acquitted conduct to justify the legality of a criminal sentence under the Sixth Amendment. Indeed, as acknowledged by the Government, "to the extent that this Court is holding petitions raising this [acquitted conduct] issue for further consideration, it would be appropriate to accord similar treatment to the petition in this case." Opp. 3. The Government also concedes that the Sixth Circuit recently granted a

rehearing en banc on this precise issue after a panel independently raised the need for review. See Opp. 3; *United States* v. *White*, 503 F.3d 487 (6th Cir. 2007).

I. REVIEW IS NECESSARY TO RECONCILE THIS COURT'S SIXTH AMENDMENT RULINGS WITH ITS EARLIER DECISION IN *WATTS*.

A decade ago, this Court held that the consideration of some acquitted conduct does not necessarily violate the Double Jeopardy Clause of the Fifth Amendment. *Watts*, 519 U.S. at 148. *Watts* addressed only "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Id.* at 240 n.4. Importantly, the argument raised by this Petition—that the consideration of acquitted conduct during sentencing violates the Sixth Amendment—"simply was not presented" in *Watts*.

Moreover, in the decade since *Watts*, this Court has repeatedly stressed the constitutional significance of the Sixth Amendment, creating an obvious tension with its earlier, limited ruling on Fifth Amendment grounds. See Pet. 14 (citing cases). This obvious tension has repeatedly been identified by a host of lower courts (Pet. at 15-17), highlighting the need for guidance from this Court. Indeed, as the Government acknowledges, the Sixth Circuit recently granted a rehearing en banc on this

precise issue after a panel independently raised the need for review. See Opp. 3; *White*, 503 F.3d 487.

The Government wholly fails to address any limitations on the scope or restrictions of *Watts*, arguing simply that that its "clear import" is that "sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution." The Government also cites its earlier arguments in other briefs in opposition to certiorari on this issue. None of these arguments responds to the basic premise that *this Court* is the only entity which can reconcile its Fifth Amendment decision in *Watts* with its recent Sixth Amendment decisions.

This Court has previously presented hypotheticals of particular sentences based on acquitted conduct which would likely *not* pass constitutional muster. For example, the Court distinguished between a permissible sentence of "months and years of imprisonment" and one which was transformed to "decades" in prison "on the basis of judgefound facts." *Rita* v. *United States*, 127 S. Ct. 2456, 2479 n.4 (2007) (Scalia, J., concurring in part and concurring in judgment). Similarly, the Court noted that "the door . . . remains open for a defendant to demonstrate that his sentence . . . would not have been upheld but for the existence of a fact found by the sentencing judge and not the jury." *Gall* v. *United States,* No. 06-7949, slip op. at 1 (U.S. Dec. 10, 2007) (Scalia, J., concurring).

This case *is* that hypothetical. Hurn's jury verdict authorized a maximum sentence of 33

months, yet the district court, relying "almost entirely" on the acquitted crack cocaine distribution charge, sentenced him to 210 months in prison. This 530% increase in sentence is precisely the outlier case to which this Court has previously alluded, increasing the sentence by fifteen years on the basis of judgefound facts. Absent the district court's heavy reliance on acquitted conduct, it could not have imposed a 210-month sentence, 177 months longer than the advisory Guidelines sentence which was supported by facts actually found by the jury. Worse, this sentence enhancement was based on conduct expressly *rejected* by the jury verdict.

The Government argues that the Court should deny certiorari because it has previously denied such petitions. Opp. 3. It is well settled, however, that the denial of certiorari has no precedential value, nor does it express this Court's view on the merits of the question presented. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J.); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 306 & n.66 (8th ed. 2002) (collecting cases); see also *Mercado* Pet. 9-10.

Nor are the five cases cited by the Government on point, because—unlike this case—none provided this Court with an appropriate vehicle for resolving the question of acquitted conduct during sentencing. Opp. 3. In two of the cases, no Sixth Amendment challenge was raised in the circuit courts. *Lynch* v. *United States*, 437 F.3d 902, 915-16 (9th Cir.) (en banc), *cert. denied*, 127 S. Ct. 89 (2006); *Magluta* v. *United States*, 126 S. Ct. 2966 (2006) (No. 05-952).

In the third case, the petitioner *had not been acquitted* of the conduct forming the basis for the contested sentence enhancement. *United States* v. *Armstrong*, 165 F. App'x 768, 770 (11th Cir.), *cert. denied*, 127 S. Ct. 109 (2006). The final two cases involved relatively minor sentence enhancements, and thus did not meet the test elucidated in *Rita* of transforming a sentence of "months and years of imprisonment to decades." *Rita*, 127 S. Ct. at 2479 n.4 (Scalia, J., concurring in part and in judgment); see Petition for Certiorari 6-7 & n.1, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430) (consideration of acquitted conduct resulted in a one-month sentence enhancement); Petition for Certiorari 2-3, *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547) (consideration of acquitted conduct resulted in an eighteen-month sentence enhancement).

Hurn's sentence and its bases stand in stark contrast to these cases. Review is consequently appropriate.

II. REVIEW IS NECESSARY TO CLARIFY WHETHER A SENTENCE RELYING "ALMOST ENTIRELY" ON ACQUITTED CONDUCT IS REASONABLE UNDER 18 U.S.C. § 3553(a).

In addition to the weighty Sixth Amendment concerns outlined in the Petition, Hurn's 210-month sentence was also unreasonable under 18 U.S.C. § 3553(a), as the district court used Hurn's conviction on possession and intent to distribute powder cocaine

to sentence him as if he had been convicted of the crack cocaine charges the jury had just rejected.

The Government argues that this issue is not properly before the Court and also that lower courts have rejected the argument that consideration of acquitted conduct during sentencing is unreasonable under 18 U.S.C. 3553(a). Neither proposition counsels against this Court's review.

First, the Government's argument that the issue was not raised below exalts form over substance. Hurn argued that his sentence based "almost entirely" on acquitted conduct was unreasonable under 18 U.S.C. § 3553(a). Pet. C.A. Br. 12-15. The Government cites this Court's decision in *United States* v. *Williams*, 504 U.S. 36, 41 (1992) in support of its argument that Hurn's unreasonableness argument "is not properly presented here." Opp. 4. In *Williams*, however, this Court expressly held that:

> It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.

Williams, 504 U.S. 36 at 41-42 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)). Here, Hurn presented and the lower courts considered arguments on both the

unconstitutionality of his sentence based on acquitted conduct and its unreasonableness under Section 3553(a). See Pet. C.A. Br. 12-15. Under any construction of Hurn's arguments, the lower courts "passed on the issue presented," and there cannot be serious dispute that this issue is "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." See Pet. 14-15, 18.

The Government also states that "courts of appeals have correctly and repeatedly rejected similar contentions." Opp. 4. The fact that lower courts have rejected such reasonableness challenges under Section 3553(a) of sentences based on acquitted conduct is unsurprising, given this Court's decision on Fifth Amendment grounds in *Watts*. It is similarly unsurprising that, given this Court's recent Sixth Amendment decisions, lower courts *also* have noted that heavy reliance on acquitted conduct is unreasonable under 18 U.S.C. § 3553(a), as it necessarily promotes disrespect for the law and sentencing. See, e.g., *United States v. Coleman*, 370 F.Supp.2d 661, 671 n.14 (S.D. Ohio 2005); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring). This apparent conflict between *Watts* and this Court's more recent decisions counsels *in favor* of this Court's review.

Additionally, Hurn's mental infirmities—acknowledged by both lower courts—underscore the unreasonableness of his sentence, and the corresponding importance of this Court's review. Although acknowledging that Hurn's low IQ "does

mitigate the crime," the district court still deliberately sentenced Hurn "near the high end" of the Guidelines range. App. C35: App. A9. The result was an imposed sentence almost 530% higher than Hurn's conviction for powder cocaine authorized without additional fact-finding.

Even if the Sixth Amendment permits the consideration of *certain* acquitted conduct under *certain* circumstances, there must remain statutory, constitutional, and policy-driven limitations. This Court should grant review to allow it to sketch more completely the outliers and boundaries of reasonableness review of acquitted conduct-based sentencing.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted this 4th day of March, 2008.

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